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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1981

No. 81-

JOHNNY LEE GATES,

Petitioner,

VS.

WALTER ZANT, Superintendent,

Georgia Diagnostic and Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE SUPERIOR COURT OF BUTTS COUNTY

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81-5240

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IN THE

SUPREME COURT OF THE UNITED STATES

TERM, 1981

No. 81-

JOHNNY LEE GATES,

Petitioner,

VS.

WALTER ZANT, Superintendent,
Georgia Diagnostic and Classification
Center,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO
THE SUPERIOR COURT OF BUTTS COUNTY

Petitioner prays that a writ of certiorari be issued to review the judgment of the Superior Court of Butts County, Georgia entered on January 16, 1961. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia May 14, 1981.

CITATIONS TO OPINION BELOW

Application for certificate of probable cause to appeal was denied by the Georgia Supreme Court May 14, 1981. The order of the Georgia Supreme Court and the unreported opinion of the Superior Court of Butts County are set out in Appendices A and B respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgment of the Superior Court of Butts County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was denied May 14, 1981. Pursuant to Rule 20 of the Rules of the Supreme Court the time for this petition runs from the denial of review issued by the Georgia Supreme Court May 14, 1981.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix C hereto:

Georgia Code Ann. §26-1101

Georgia Code Ann. §38-801(d)

Georgia Code Ann. §50-127

Georgia Code Ann. §24-4526

Georgia Code Ann. §27-2534.1(b)!(1)-(7)1

QUESTIONS PRESENTED

-1-

Whether Georgia Code Ann. §27-2534.1(b)(7), upon which Petitioner's death sentence was in part based, was applied in Petitioner's case in a vague, overbroad, arbitrary and capricious manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Whether Georgia Code Ann. §38-801(d), requiring the tender of attendance and mileage fees with a witness subpoena, denied Petitioner, an indigent death row inmate in a state habeas corpus proceeding, equal protection of the law, meaningful access to the courts and compulsory process to compel the attendance of witnesses in his behalf as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution.

HOW THE ISSUES WERE RAISED BELOW

-1-

In his state habeas corpus petition, Petitioner raised the issue of the unconstitutional application of Ga. Code Ann. §27-2534.1(b)(7) in his case. The habeas corpus court considered the merits of this issue and found against Petitioner. The constitutional issues were raised again on application for certificate of probable cause to appeal in the Georgia Supreme Court which denied the application.

-2-

In his State habeas corpus petition, Petitioner raised the issue of the unconstitutional application of Georgia Code Ann. §38-801(d). The Constitutional issues were raised again.

STATEMENT OF THE CASE

On September 1, 1977, Petitioner was convicted of murder and sentenced to death in the Superior Court of Muscogee County, Georgia. The judgment and sentence was affirmed by the Georgia Supreme Court in Gates v. State, 244 Ga. 586 (1979).

Certiorari was denied by this Court in Gates v. Georgia, ___

U.S. ____ (1980).

On April 3, 1981, a petition for writ of habeas corpus was filed in the Superior Court of Butts County, Georgia; the petition was subsequently amended.

The court denied habeas corpus relief on January 16, 1981 in an unreported decision. On May 14, 1981, the Georgia Supreme Court denied a timely application for certificate of probable cause to appeal.

REASONS FOR GRANTING THE WRIT

1. GEORGIA CODE ANN. §27-2534.1(b)(7), UPON WHICH PETITIONER'S DEATH SENTENCE WAS IN PART BASED, WAS APPLIED IN PETITIONER'S CASE IN A VAGUE, OVERBROAD, ARBITRARY AND CAPRICIOUS MANNER, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner's sentence of death was imposed by the trial court based in part upon a finding by the jury of the aggravating circumstance defined in Georgia Code Ann. §27-2534.1(b)(7).

In his state petition for writ of habeas corpus, Petitioner challenged the constitutionality of his sentence of death based in part on the §27-2534.1(b)(7) aggravating circumstance.

This Court has long recognized that the imposition of the death penalty may not be done in a capricious or arbitrary manner, arising out of passion or prejudice; for to do so is violative of the Eighth and Fourteenth Amendments. Furman v. Georgia, 409 U.S. 241 (1972).

This Court in Godfrey v. Georgia, ____ U.S. _____, 100 S. Ct. 1759 (1980), set forth two criteria that must be met if the Georgia Courts wish to impose a death sentence based upon a finding of the aggravating circumstance under Georgia Code Ann. §27-2534.1(b)(7).

The first criteria involves the trial court's instructions to

the jury. Since the language of §(b)(7) fails to imply "...any inherent restraint on the arbitrary and capricious infliction of the death sentence", the trial court is required to impose a narrowing construction upon §(b)(7) in its jury charge. The trial court has a constitutional responsibility to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance'" to the jury. Godfrey v. Georgia, supra, at 1764-1765.

As this Court previously has recognized in reviewing Georgia's death penalty statute, it would be "virtually unthinkable" for a jury to decide whether a person should live or die without "careful instructions on the law and how to apply it" Gregg v. Georgia, 428 U.S. 153, 193 (1976).

In instructing the jury, the trial court should insure that the evidence that the offense was "outrageously and wantonly vile, horrible or inhuman" demonstrate "torture, depravity of mind, or an aggravated battery to the victim", Godfrey v. Georgia, supra at 1766.

Secondly, for a jury to find "depravity of mind", it must find that the defendant had the type of mental state that led him to torture or commit an aggravated battery prior to the death of the victim, Id at 1766.

Finally, the word "torture" must be construed in pari materia with "aggravated battery" so as to require evidence of serious physical abuse of the victim before death, Id at 1766.

As in Godfrey, none of these standards were used in the present case to lay out the limits of §(b)(7) to the jury. Rather, the trial court simply read the text of the statute in its jury charge (The complete charge to the jury is attached hereto as Appendix D). Repeating the language of §(b)(7) is clearly inadequate to protect against capricious and arbitrary decisions. The statute offers a jury no guidance concerning its intended meaning, Godfrey v. Georgia, supra, at 1765, and when no further

guidance is given to the jury, its interpretation of §(b)(7) "...can only be the subject of sheer speculation", Id at 1765.

Quite obviously, the type of reasoned and channeled discretion envisioned in Furman v. Georgia, supra, cannot be obtained through the jury instructions used in both Godfrey and this case.

The second criteria addressed in Godfrey involves the role of the Georgia Supreme Court in its sentencing review. Like the trial court, the State Supreme Court is also required to lay out the limits of §(b)(7) by applying the three definitional standards, Godfrey v. Georgia, supra, at 1767. Under the Godfrey rationale, the death sentence in this case should be vacated. The Georgia Supreme Court failed to establish the limits of §(b)(7) in the manner required by Godfrey.

On direct review of Petitioner's death sentence, the sole review by the Georgia Supreme Court of the application of the §(b)(7) is as follows:

> The defendants jury was not charged on the meaning of this aggravating circumstance as it was intended by the Legislature and has been interpreted by this Court. However, for the reasons which appear below, it is unnecessary for us to decide whether the death penalty imposed by this case must be set aside on this ground.

The Supreme Court held later in the opinion:

> Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon.

The trial jury was given no guidance on the standards by which the §(b)(7) circumstance is applied. However the Georgia Supreme Court held that since the Judge failed to properly charge the jury that §(b)(7) could not support a death sentence in this case.

The Georgia habeas corpus court disposed of this issue by stating, "The Supreme Court expressly grounded its affirmance of the death penalty on the finding of other aggravating circumstances. Therefore the issue raised under Godrey v. Georgia is irrelevant to the question of whether Gates death penalty has been constitutionally imposed under the Georgia statute. (Appendix B at p.7).

In light of the Georgia Supreme Court's decision that the aggravating circumstances in §(b)(7) was not properly charged, the key issue becomes whether or not the jury used the §(b)(7) aggravating circumstances to support the death sentence. If §(b)(7) was the sole basis for the jury to decide to give the defendant a death sentence, then has the Supreme Court overstepped its perview by imposing a death sentence based on the other two aggravating circumstances.

Even though a jury finds that more than one aggravating circumstance exists, it is nevertheless free to impose a life sentence. While the finding of one or more aggravating circumstances permits a sentence of death, the finding of such circumstances never requires that it be imposed, Bowen v. State, 241 Ga. 492, 246 S.E. 2d 322 (1978).

The verdict of the jury to impose the death penalty in Georgia must be unanimous; if even one juror refuses to impose the death penalty, the defendant is sentenced to life imprisonment. Miller v. State, 237 Ga. 557, 229 S.E. 2d 376 (1976).

Under this scheme, each aggravating circumstance plays an important role in influencing the jury's decision. However, the weight given each circumstance by each juror is unclear and can only be speculated.

If the jury is improperly allowed to base its decision partially upon a finding of a §(b)(7) circumstance, it is impossible to determine to what extent the jury's decision to impose the death penalty rested upon the §(b)(7) circumstance.

This situation, which exists in the present case, invokes the rule that any ambiguity as to whether a judgment rests upon a constitutionally unsound judgment requires its reversal. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87, 91-92 (1965). Where the jury is permitted to convict upon alternative legal theories, one of which is constitutionally permissible and the other of which is not, the jury's general verdict cannot stand. Stromberg v. California, 183 U.S. 359 (1931); Williams v. North Carolina, 317 U.S. 287 (1942); Terminello v. Chicago, 337 U.S. 1 (1949).

> "These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in a guilt-determining phase of any criminal trial." Pressnell v. Georgia, 439 U.S. 14, 19 (1978).

In fact, they should apply with added force because of the heightened "need for reliability in the determination that death is the appropriate punishment in a specific case", Woodson v. North Carolina, 428 U.S. 280, 305 (1979).

Because it cannot be said with assurance that the improper finding of a §(b) (7) circumstance played no part in the jury's decision to impose the death penalty, Petitioner's death sentence should be vacated.

2. GEORGIA CODE ANN. §38-801(d), REQUIRING THE TENDER OF ATTENDANCE AND MILEAGE FEES WITH A WITNESS SUBPOENA, DENIED PETITIONER, AN INDIGENT DEATH ROW INMATE IN A STATE HABEAS CORPUS PROCEEDING, EQUAL PROTECTION OF THE MEANINGFUL ACCESS TO THE COURT AND COMPULSORY PROCESS TO COMPEL THE ATTENDANCE OF WITNESSES IN HIS BEHALF AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Petitioner, an indigent death row inmate, sought habeas corpus review in State court of his conviction and death sentence. Prior to the hearing, Petitioner's counsel filed motions requesting funds for investigators and expert witnesses. (Appendix E). These

motions were denied by the habeas corpus court during the hearing.

Due process may not require the Georgia legislature to institute the post-conviction procedure in Georgia Code Ann. §50-127. However, once provided, this procedure must be administered to provide a full and fair hearing and comport with the principles of Fourteenth Amendment due process and equal protection. Douglas v. California, 372 U.S. 353 (1963). The action of the Georgia habeas corpus court denying Petitioner's motions deprived Petitioner of meaningful access to the state habeas corpus proceeding. Bounds v. Smith, 430 U.S. 817 (1977).

"The right to offer the testimony of witnesses and to compel their attendance if necessary...is a fundamental element of due process of law." Washington v. Texas, 388 U.S. 14, 19 (1967). See also, Webb v. Texas, 409 U.S. 95 (1972). The Georgia Code Ann. §38-801(d) requires witness and mileage fees to be tendered with a subpoena if the subpoena is to be enforceable. Thus, an indigent is deprived of the right to compulsory process.

In Lawrence v. Henderson, 344 F. Supp. 1287 (E.D. La. 1972), prison officials had refused to allow inmates served with subpoenas by a defendant to comply with the subpoenas. In holding these facts to constitute a violation of the right to compulsory process, the District Court stated:

> "The record is barren as to the reason for the denial of compulsory process. Petitioner may have had it denied him through inadvertance or other innocent reason. The cause of the denial, however, is immaterial. It is the resulting inability to compel [the witness] to testify which is unconstitutional."
> 344 F. Supp. at 1295.

The ability to compel the attendance of witnesses is essential if Petitioner is to present the merits of his habeas corpus petition in the habeas proceeding. The record of his trial and direct appeal are of little value in the post-conviction proceeding, without supplementation by testimony from witnesses.

A petitioner must be able to present witnesses to substantiate

newly discovered and often complex claims with respect to the unconstitutionality of his conviction and sentence. Without the funds to subpoena witnesses, the post-conviction procedure is but a legal fiction for the indigent petitioner.

In a long series of cases, this Court has invalidated processes which denied the poor access to the courts or made that access ineffectual. In Griffin v. Illinois, 351 U.S. 12 (1956), this Court mandated that an indigent be provided the necessary transcripts to pursue an appeal; in Burns v. Ohio, 360 U.S. 252 (1959), the Court struck down a scheme which required an individual to pay filing fees as a prerequisite to prosecuting the appeal. In Smith v. Bennett, 365 U.S. 708 (1961), the Court struck down a scheme which denied indigents access to the courts for the purposes of seeking collateral review unless a filing fee could be paid. In each of these cases, the impediment to access to the judicial system was clearly cost.

In the present case, the Georgia law restricting Petitioner's ability to compel the attendance of witnesses created a de facto barrier to Petitioner's assertion of his constitutional claims and rendered meaningless the formal access to post-convictin relief afforded him.

The Georgia habeas corpus procedure is a procedure that Petitioner must utilize and complete before he can petition in a United States District Court for a writ of habeas corpus.

The state habeas corpus proceeding may finally determine Fourth Amendment constitutional claims, Stone v. Powell, 428 U.S. 465 (1976), and may very well be determinative of and foreclose consideration of other substantial issues in the federal proceeding because "a determination after a hearing on the merits of a factual issue, made by a State Court of competent jurisdiction...shall be presumed to be correct..." in the

federal proceeding. 28 U.S.C. §2254(d).

The function of the Georgia habeas corpus procedure as a means of determining constitutional claims in criminal cases is made clear by the Legislature's statement of legislative intent included with 1967 Ga. Laws, p. 835, et seq., a complete revision of the habeas corpus statute:

> Section 1. Statement of Legislative Intent and Purpose.
>
> The General Assembly finds that expansion of the scope of habeas corpus in federal court by decisions of the United States Supreme Court, together with other decisions of said court (a) substantially curtailing the doctrine of waiver of constitutional rights by an accused and (b) limiting the requirement of exhaustion of state remedies to those currently available, have resulted in an increasingly larger number of state court convictions being collaterally attacked by federal habeas corpus based upon issues and contentions not previously presented to or passed upon by courts of this State; that such increased reliance upon federal courts tends to weaken state courts as instruments for the vindication of constitutional rights, with a resultant deterioation of the federal system and federal-state relations; that to alleviate said problems, it is necessary that the scope of state habeas corpus be expanded and modified. The General Assembly further finds that expansion of state habeas corpus to include many sharply-contested issues of a factual nature requires that only the superior courts have jurisdiction of such cases.

The deprivation of Petitioner's right to due process and equal protection of law must be given the special scrutiny peculiar to cases where death is the penalty. "Death is its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Georgia habeas corpus review must not be administered so as to deprive Petitioner, an indigent under death sentence, of an opportunity to litigate his constitutional claims. Georgia Code Ann. §38-801(d) deprives Petitioner of meaningful access to the courts in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Superior Court of Butts County.

Respectfully submitted,

RONNIE K. BATCHELOR,
ATTORNEY FOR PETITIONER

4179 Memorial Drive
Decatur, Georgia 30032
404/296-1500

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of within and foregoing Petition for Writ of Certiorari to the Superior Court of Butts County, Georgia, upon the respondent in this action by placing same in the United States Mail with proper first class postage affixed, address to:

W. Davis Hewitt
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

This the 12th day of August, 1981.

Ronnie K. Batchelor

RONNIE K. BATCHELOR

Application No. 1542

3782

SUPREME COURT OF GEORGIA

ATLANTA, May 14, 1981

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JOHNNY LEE GATES V. WALTER ZANT, SUPT.

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams, Clerk.

APPENDIX A

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

JOHNNY LEE GATES,	:	
	:	
PETITIONER	:	HABEAS CORPUS
	:	CASE NO. 4646
VS.	:	
	:	
WALTER ZANT,	:	
SUPERINTENDENT,	:	
	:	
RESPONDENT	:	

O R D E R

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Muscogee County. Gates was convicted of Rape, Armed Robbery, and Murder. He was sentenced to death for Murder and a term in the penitentiary for the other offenses. His convictions and sentences were affirmed by the Supreme Court. Gates v. State, 244 Ga. 586 (1979). Certiorari was denied by the Supreme Court of the United States.

The Petition contains 37 numbered paragraphs, 25 of which allege substantive claims for relief. (10-29; 32-37). Evidence and argument have been presented on only 3 points, however, and the Court will address only these claims for relief. All unsupported allegations will be deemed abandoned and without merit.

APPENDIX B, P. 1

The record in this habeas case consists of the transcript of proceedings before this Court on September 16, 1980; the deposition of William S. Cain; and the transcript and record of Petitioner's trial in Muscogee Superior Court commencing on August 30, 1977.

I.

Petitioner claims the Grand Jury that indicted him and the Traverse Jury that convicted him were unconstitutionally composed in violation of the Sixth and Fourteenth Amendments.

FINDINGS OF FACT

Petitioner's counsel, William S. Cain, filed no jury challenges. He was aware of the possibility of such challenges but did not believe them to be in order (H.T. 36). He made the decision that the juries were basically fair (H.T. 25; 36), that it was the consensus of the criminal bar in Muscogee County that a challenge would not be indicated (H.T. 37-8), and that he did not believe there to be any intentional discrimination against any group. (H.T. 35). No evidence has been presented indicating any systematic exclusion of any classes of persons from the jury pools.

CONCLUSIONS OF LAW

The right to object to the composition of the Grand or Traverse Jury in a habeas corpus proceeding

App. B, p. 2

under Georgia law will be deemed waived unless the Petitioner shows in the Petition and satisfies the Court that cause exists for his being allowed to pursue the objection after the conviction and sentence have otherwise become final. Ga. Code Ann. §50-127(1). The "cause" asserted by Petitioner in this case is that his trial counsel rendered ineffective assistance of counsel by failing to file timely challenges to the juries.

Such a time limitation to the assertion of a Federal constitutional right concerning juries is constitutionally permissible, and under Federal law an additional showing of actual prejudice is required. Francis v. Henderson, 425 U.S. 536, 48 L.Ed.2d 149, 96 S.Ct. 1708 (1976).

Petitioner has shown no actual prejudice because the Court has before it no evidence indicating that a jury challenge would have been successful.

On the "cause" requirement of Ga. Code Ann. §50-127(1), Petitioner seeks to establish ineffective assistance of counsel for failure to file the challenges. Petitioner has not convinced the Court that he should now be allowed to pursue this objection because his counsel was experienced in criminal practice in Muscogee Superior Court and did have some basis on which to conclude that a jury challenge would have been unsuccessful and meaningless. Particularly in

App. B, p. 3

the absence of a showing of actual prejudice (see Francis v. Henderson, supra), the Court concludes that Petitioner has waived any objection he may have had to the composition of the Grand and Traverse Juries by waiting until his sentences had become final to raise such objection. See Code Ann. §50-127(1).

But even if the Court did not conclude that waiver has occurred, Petitioner has presented nothing from which the Court could conclude that the juries were unconstitutionally composed as alleged.

This claim for relief is therefore without merit.

II.

Petitioner claims he was denied his right under the Sixth and Fourteenth Amendments to the effective assistance of counsel.

FINDINGS OF FACT

Defendant's counsel had been a member of the bar for 32 years. Since 1975, he had served as Public Defender and concentrated almost totally on criminal cases. (H.T. 4-5). In his career, he had tried 25 to 35 murder cases and had tried 6 to 8 cases involving the death penalty since the enactment of the current statute authorizing the death penalty. (H.T. 6).

Counsel filed numerous Motions (See Record, pp. 13-24), but did not challenge the Jury. He conferred with Petitioner "numerous" times (5-10) (H.T. 6; 51) prior to trial. He was given a copy of the District

App. B, p. 4

Attorney's file (H.T. 6-7) and interviewed all witnesses he considered material (H.T. 8; 44-47). Petitioner was unable to give Counsel the names of any witnesses who could help (H.T. 7); and Counsel's investigation in Petitioner's neighborhood turned up nothing helpful. (H.T. 18). Petitioner did give Counsel the name of an alleged accomplice who was interviewed by Counsel, but Counsel determined that this would not be a helpful witness. (H.T. 61).

At the trial, Counsel made an opening statement (T.T. 234-236); cross-examined the State's witnesses (254; 262; 273; 277; 287; 302; 317; 331; 342; 357; 361; 377; 403; 434); made Motions (1; 172; 414; 426; 472; 475; 548; 554; 571); gave argument during guilt/innocence phase of the trial. (T.T. 514-525); gave argument during sentencing phase (T.T. 595-604). Counsel offered no evidence during the sentencing phase (T.T. 574) but this was a result of the refusal of Gates to take the stand to ask for mercy in spite of efforts by Counsel to get him to do so. (H.T. 64-65).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

App. B, P. 5

Petitioner's Counsel easily meets this test. He was experienced in the trial of criminal cases and unusually experienced in death penalty cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner considering the difficulty of the case and the lack of material to work with. While it may be true that Counsel put up a relatively scant defense, the finest lawyer in the country could not put up a defense that did not exist. Defense Counsel's deposition shows him to be an intelligent and concerned defense lawyer. The effort he put forth for Gates was certainl reasonably effective within the meaning of the standard. (Cf. Bowden v. Zant, 244 Ga. 260 (1979).

That Counsel did not file a jury challenge does not make him ineffective in a constitutional sense. Petitioner has not shown that there was anything wrong with the Grand or Traverse Jury pools. Ergo, the Court concludes that Petitioner has not demonstrated that Counsel's decision not to file a challenge was clearly erroneous or that he was ineffective as a result of such decision. Birt v. Hopper, 245 Ga. 221, 224 (1980).

This claim for relief is without merit.

III.

Petitioner claims that the application of Ga. Ann. §27-2534.1(b)(7) to this case is unconstitutional

App. B, p. 6

because of vagueness and overbreadth; and that the Sentence Review was not capable of determining whether the death sentence was excessive or disproportionate.

FINDINGS OF FACT

The Jury found three aggravating circumstances to have been proven beyond a reasonable doubt, one of which involved (b)(7). A Sentence Review was conducted by the Supreme Court on direct appeal.

CONCLUSIONS OF LAW

The death sentence in this case was not upheld on the basis of (b)(7). That aggravating circumstance was not properly submitted to the Jury and the Supreme Court expressly grounded its affirmance of the death penalty on the finding of other aggravating circumstances. Gates v. State, 244 Ga. 587, 598-99 (1979). Therefore, the issue raised under Godfrey v. Georgia, ___U.S.___, 64 L.Ed2d 398, 100 S.Ct. __ (1980), is irrelevant to the ultimate question of whether Gates' death penalty has been constitutionally imposed under the Georgia Statute.[1]

The Sentence Review has already been conducted and decided adversely to Petitioner's position. Gates v. State, supra, at p. 600.

This claim for relief is, therefore, without merit.

App. B, p. 7

[1] Ga. Code Ann. §2534.1

WHEREFORE, all allegations in the Petition having been found either without merit or abandoned, the Petition, as amended, is denied.

This 16th day of January, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

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GEORGIA CODE PROVISIONS

Georgia Code Annotated Section 24-4526

Appeals of Habeas Corpus After Criminal Convictions

When Applications Granted An application to appeal a final judgment in a habeas corpus case after a criminal conviction will be granted where there is arguable merit.

Georgia Code Annotated Section 26-1101

Murder (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

Georgia Code Annotated Section 38-801(d)

(d) Fees; mileage.--The witness fee shall be $10 per diem, and execution shall be issued by the clerk upon affidavit of the witness to enforce payment thereof. The payment of fees shall not be demanded as a condition precedent to attendance, but when a witness resides outside the county where the testimony is to be given, service of the subpoena to be valid must be accompanied by tender of the fee for one day's attendance plus mileage of 20 cents per mile for traveling expenses for going from and returning to his place of residence by the nearest practical route. Tender of fees and mileage may be made by United States currency or postal money order, or by cashier's or certified check. When the subpoena is issued on behalf of the state, or an officer, agency or political subdivision thereof, or a defendant in a criminal case, fees and mileage need not be tendered.

Georgia Code Annotated Section 50-127

Exclusive procedure for suing out a writ of habeas corpus for persons whoses liberty is being restrained by virtue of a sentence imposed against them by a State court of record

Notwithstanding the other provisions of the Title, the following is the exclusive procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a sentence imposed against them by a State court of record:

APPENDIX C

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(1) Grounds for writ.--

Any person imprisoned by virtue of a sentence imposed by any State court of record who asserts that in the proceedings which resulted in his conviction there was a substantial denial of his rights under the Constitution of the United States or of the State of Georgia or the laws of the State of Georgia may institute a proceeding under this section. Except for objections relating to the composition of a grand or traverse jury, rights conferred or secured by the Constitution of the United States shall not be deemed to have been waived unless it is shown that there was an intentional or abandonment of a known right or priviledge which relenquishment or abandonment was participated in by the party and was done voluntarily, knowingly, and intelligently. The right to object to the composition of the grand or traverse jury will be deemed waived under this section, unless the person challenging the sentence showa in the petition and satisfies the court that cause exists for his being allowed to pursue the objection after the conviction and sentence has otherwise become final.

(2) Petition and verification.--

The petition shall identify the proceeding in which the petitionor was convicted, give the date of rendition of the final judgment complained of, and clearlyset forth the respects in which petitioner's rights were violated. The petition shall have attached thereto affidavits, records, or other evidence supporting its allegations or shall state why the same are not attached. The petition shall identify any previous proceedings that petitioner may have taken to secure relief from conviction. Argument and citations of authorities shall be omitted from the petition. The petition must be verified by the oath of the applicant or some other person on his behalf.

(3) Jurisdiction and venue.--

The petition must be filed in the superior court of the county wherein the petitioner is being detained. The superior courts of such counties have exclusive jurisdiaction of habeas corpus actions arising under this section.

(4) Service of the petition.--

Service of the petition shall be made upon the person having custody of the petitioner. If the petitioner is being detained under the custody of the Board of Corrections, an additional copy of thepetition shall be served on the Attorney General; however, if the petitioner is being detained under the custody of some other quthority other than the Board of Corrections, an additional copy of the petition shall be served upon the solicitor general of the county wherein the petition is filed. Service upon the Attorney General or the solicitor general may be had by mailing a copy of the petition along with a proper certificate of service.

(5) Custody of petitioner.--

Custody and control of the petitioner shall be retained by the Board of Corrections or other authority having custody of the petitioner and it shall be the duty of such board or authority to produce the petitioner at such times and places as the court may direct.

(6) Proceedings on petition.--

Within 20 days after filing and docketing of the petition, or within such further time as the court may set, the respondent shall answer or move to dismiss the petition. The court shall set the case for a hearing on the issues within a reasonable time after the filing of defensive pleadings.

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(7) Disposition in the trial court.--

(a) The court may receive proof by depositions, oral testimony, sworn affidavits, or other evidence.

(b) The taking of depositions upon written questions, by either party, shall be governed by the provisions of sections 81A-127 through 81A-132 and 81A-137: Provided, however, that the time allowed in section 81A-131 for service of cross-questions upon all other parties shall be 10 days from the date the notice and written questions are served.

(c) If sworn affidavits are intended by either party to be introduced into evidence, the party intending to introduce the affidavit shall cause it to be served upon the opposing party at least five days in advance of the date set for a hearing in the case. The affidavit so served shall be accompanied by a notice of the party's intention to introduce it into evidence. The superior court judge considering the petition for writ of habeas corpus may resolve disputed issues of fact upon the basis of sworn affidavits standing by themselves.

(d) If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence challenged in the proceeding and such supplementary orders as to rearraignment, retrial, custody, or discharge as may be necessary and proper. In all cases the court shall dispose of the matter as law and justice require.

(8) Transcribing proceedings.--

All trials held under this section shall be transcribed by a court reporter designated by the superior court hearing the case.

(9) Judge's findings of fact and conclusions of law.--

After reviewing the pleadings and evidence offered at the trial of the case, the judge of the superior court hearing the case shall make written findings of fac t and conclusions of law upon which the judgment is based. Such findings of fact and conclusions of alw shall be recorded as part of the record of the case.

(10) Subsequent petitions--waiver of grounds not claimed.--

All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be riased by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of the State of Georgia otherwise requires, or any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

(11) Practice as to appeals.--

(a) Appeals in habeas corpus cases shall be governed by the Appellante Procedure Act of 1965 [§6-701 et seq], except that as to final orders of the court which are adverse to the petitioner, no appeal shall be allowed unless a justice of the Supreme Court of Georgia shall issue a certificate of probable cause for such appeal.

(b) Within 30 days from the entry of the order denying relief to the petitioner, a written application for a certificate of probable cause to appeal must be filed with the clerk of the Supreme Court of Georgia, if the unsuccessful petitioner desires to appeal. The petitioner shall also file, within the same period, a notice of appeal with the clerk of the concerned superior court. A justice of said appellate court shall either grant or deny the application within

a reasonable time after filing. So the justice may fully consider the request for a certificate, the clerk of the concerned superior court shall forward as in any other case, the record and transcript if designated, to the clerk of the Supreme Court of Georgia when a notice of appeal is filed. The clerk of the concerned superior court need not prepare and retain and the court reporter need not file, a copy of the original record and a copy of the original transcript of the proceedings. The clerk of the Supreme Court of Georgia shall return the original record and transcript to the clerk of the concerned superior court upon completion of the appeal if the certificate is granted. If the Justice of the Supreme Court of Georgia denies the application for a certificate of probable cause, the clerk of the Supreme Court of Georgia shall return the original record and transcript and notify the clerk of the concerned superior court and the parties to the proceedings below of the determination that probable cause does not exist for appeal.

(c) If the trial court finds in favor of the petitioner, no certificate of probable cause need be obtained by the respondent as a condition precedent to appeal. A notice of appeal filed by the respondent shall act as a supersedeas and stay the judgment of the superior court until there is a final adjudication by the appellate court: Provided, however, that while such case is on appeal, the petitioner may be released on bail as is now provided for in criminal cases, except where the petitioner has been convicted of a crime over which the Supreme Court of Georgia has jurisdiction to consider on direct appeal. The right to bail and the amount of bond shall be within the discretion of the judge of the superior court where the sentence successfully challenged under this chapter was originally imposed.

Georgia Code Annotated Section 27-2534.1(b)(7)

(b)(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

THE COURT: Anything additional from the defense, Mr. Cain.

MR. CAIN: No, sir.

THE COURT: All right, sir.

CHARGE OF THE COURT

Now, ladies and gentlemen, the defendant in this case has been found guilty of the offense of murder and it is now your duty under the laws of the State of Georgia to make certain decisions that will affect the sentence which the Court will impose as punishment for that offense.

Under the law of this State, every person found guilty of murder shall be punished by death or imprisonment for life.

I instruct you that although under the law of Georgia that it is my responsibility as the presiding judge to fix the sentence, the determination that you now make will affect the sentence will be prescribed. Your responsibility at this stage of the trial is to determine first whether any mitigating or aggravating circumstances existed at the time the murder was committed which would authorize you to recommend the death penalty for the defendant.

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Before you would be authorized to [illegible] death penalty, you must first determine whether at the time the crime was committed the following statutory aggravating circumstances existed beyond a reasonable doubt: Number one, if the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: armed robbery and/or that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: rape and/or that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim.

So, ladies and gentlemen, if you find that the aggravating circumstances existed beyond a reasonable doubt and if you recommend the death penalty, then this Court is required by law to sentence this defendant to death. On the other hand, ladies and gentlemen, you can see fit, whether aggravating circumstances existed or not, to recommend mercy for the defendant, if this should be your finding, then the Court is required by law to sentence the defendant to life imprisonment.

In arriving at your determinations, ladies and gentlemen, you are authorized to consider all the

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evidence received throughout this trial presented by the State and the defendant. You are authorized to include in your consideration the facts and circumstances, if any, in mitigation and aggravation.

Mitigating circumstances are those which do not constitute a justification or excuse for the offense in question but which in fairness and mercy may be considered as extenuating or reducing the degree of moral culpability or blame.

Aggravating circumstances, ladies and gentlemen, are those which increase the guilt or the enormity of the offense or add to it's injurious consequences.

Now, ladies and gentlemen, the form of your verdict in fixing punishment would be one of the following and should read -- and I will later give you the form of the verdicts to take out and explain these further.

Number one, the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: armed robbery, and we recommend the death penalty.

The offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: rape, and we recommend the death penalty. And/or the offense of murder was outrageously

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or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim, and we recommend the death penalty.

Now, ladies and gentlemen, even though you find the statutory aggravating circumstances that I have just enumerated to exist, you may refuse to recommend the death penalty, in which event the defendant would receive a sentence of life imprisonment.

Should you fail to find aggravating circumstances as I have instructed you, then, of course, the form of your verdict would be simply, "We the jury recommend mercy."

Should this be your verdict, it would mean that the Court would sentence the defendant to life imprisonment.

Your decision must be unanimous, must be in writing and dated and signed by your foreman.

Now, ladies and gentlemen, the law requires that I send out the instructions that I just gave you in writing and these will go out with you so that you may refer to them additionally if you see fit.

Now, you will have an option, ladies and gentlemen, in this case to return one of three verdicts, and the forms of these verdicts have been written and you may use them -- these forms -- on which to place your verdict.

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Number one is that the offense -- and the State contends that there are three aggravating circumstances. One is that he committed the offense of murder while involved in the commission of another capital felony, to-wit: armed robbery. The second one was that he was -- the murder was committed while the defendant was engaged in the commission of another capital felony, to wit: rape. And that the offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim.

Now, ladies and gentlemen, you may consider one or all three of those aggravating circumstances if you find beyond a reasonable doubt they do exist.

So, therefore, the form of your verdict would be, -- that the aggravating circumstances, as set out in each of these two forms of verdict, and they are that the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: armed robbery. Two, the offense of murder was committed while the offender was engaged in the commission of another capital felony, to-wit: rape: The offense of murder was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim.

So, the form of your verdict would be: one, "We

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the jury find that the offense of murder was committed while the offender -- under the following aggravating circumstances -- and then you would enumerate one or all three of them, whichever you determine -- and after that you would add, "And we recommend the death penalty."

The other verdict is identical in that with the instructions that I gave you, applicable to that verdict, and it would be, "We the jury find the following aggravating circumstances to exist -- and you enumerate one or all three of them, if you so find -- and you may add to that, "We do not recommend the death penalty." Which would mean in that event that the Court is bound by law to sentence the defendant to imprisonment for life.

Of course, if you do not find any aggravating circumstances to exist whatsoever, the form of your verdict would simply be, "We the jury, having found the defendant guilty of the offense of murder, and we having found no aggravating circumstances, we the jury recommend mercy."

That would mean that the Court by law must sentence this defendant to life imprisonment.

So, ladies and gentlemen, these three forms of verdict will be out with you and you use whichever one you members of the jury unanimously agree upon, and

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after you have unanimously agreed upon it and have completed it, have your foreman to then date it and sign it and return it into Court. Please retire to the jury room, ladies and gentlemen.

(WHEREUPON, THE JURY RETIRED
(FROM THE COURTROOM AT 4:17
(P.M.)

THE COURT: Ask the jury to come in.

(WHEREUPON, THE JURY RETURNED
(TO THE COURTROOM AT 5:00 P.M.

THE COURT: Mr. Foreman, ladies and gentlemen, do you have a question?

THE FOREMAN: Yes, sir, we have a question. We would like a definition of the following phrase: Depravity of mind to the victim.

THE COURT: All right, sir. I anticipated that was going to be your question. That's why I've got these dictionaries here. And I can only give you the definition of what a depraved mind is in the dictionary.

One legal dictionary here, Black's Law Dictionary, says a depraved mind is an inherent deficiency of moral sense and rectitude, equivalent to statutory phrase, "depravity of heart" defined as highest grade of malice.

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And the definition of deprave is to defame; vilify; exhibit contempt for.

Now, this is a bigger dictionary and let me see if I can give you the definition of that. And that is as far as I can go gentlemen. The legislature created that law and they did not place a definition [illegible] Code on it.

This dictionary says the definition of depraved is to make bad the judgement rather than making it more discriminating, to pervert the meaning of something, to make corrupt, to bring about the moral debasement, to reduce in value.

That's what the legal dictionary says that depraved and depravity is. And so, my interpretation -- and I hope it is correct -- that his actions were so vile, horrible or inhuman that he created such a state of mind in the victim as defined by the word depravity.

That is the very best I can do for you, ladies and gentlemen. I wish I could do better.

THE FOREMAN: In that case, we shouldn't be very long in reaching a verdict.

THE COURT: All right, sir.

(WHEREUPON, THE JURY RETIRED
(FROM THE COURTROOM.

MR. CAIN: Your Honor, now that the jury has

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retired, would it be in order for me to ask Your Honor from what you were reading?

THE COURT: Yes, sir. I was reading, Mr. Cain, from Black's Law Dictionary, the revised fourth edition, and I was reading from Webster's Third New International Dictionary, unabridged, entitled The Great Library of the English Language.

MR. CAIN: Yes, sir.

Well, we will just note for the record, particularly as to using Webster's Dictionary to define depravity, as a legal term in a capital sentence type case, that there's no authority that I know of that Webster's Dictionary, insofar as it deals with subsection seven of a criminal statute, would be any authority whatsoever and we must take exception to it.

THE COURT: All right, sir. Certainly, if the Court had given the issue -- the issue is whether the definition that I gave them be reference to these dictionaries is correct or not. Had I given them this, that would have been the question, whether it was correct or not. I anticipated that was going to be their question and I tried to find an acceptable answer, and it was difficult, and all I could do was to refer to these authorities, which are recognized authorities for definitions. Whether I could find one in a [illegible] in any

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other legal dictionary -- Black's Law Dictionary, of course, is a legal dictionary recoginized as an authority by the State of Georgia.

MR. CAIN: There again, that was one of my points in my original objection, as to the language in the [redacted] being so indefinite as to [redacted]

THE COURT: [redacted] interpretation and perhaps [redacted] interpret it for us. [redacted]

MR. CAIN: I think they will.

THE COURT: As the jury to come in.

(WHEREUPON, THE JURY RETURNED

(TO THE COURTROOM AT 5:15 P.M.

THE COURT: Mr. Foreman, ladies and gentlemen, have you reached a verdict, sir?

THE FOREMAN: Yes, we have, Your Honor.

THE COURT: All right, Mr. Smith, publish the verdict, please.

MR. SMITH: Just the verdict, we find the following aggravating circumstances; one, armed robbery; two, rape; three, outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind to the victim, and we recommend the death penalty, this 1st day of September, 1977, James Heaton, foreman.

It appears to be in order.

THE COURT: Is there any objection to the form of the verdict, gentlemen?

MR. CAIN: Can I just read the Code section just one minute?

THE COURT: The Code section, Mr. Cain, if you don't have it readily available, there it is.

MR. CAIN: I just wanted to read subparagraph 7.

THE COURT: 7, yes. 27-2534.1. The language that the Court put in the sentence defining the statutory aggravating circumstances was taken from the Code.

MR. CAIN: There is no objection to the form of the verdict.

MR. SMITH: Just a minute, Your Honor.

THE COURT: Any objection, Mr. Smith?

Ladies and gentlemen, that concludes this week's trials.

MR. CAIN: Your Honor, I am wondering if I would not have the responsibility -- I see nothing in the Code section authorizing a poll of the verdict.

THE COURT: The Court would allow it, Mr. Cain.

MR. CAIN: I just don't see anything in the Code. I was just wondering if it was not necessarily my responsibility if I did poll the jury.

THE COURT: That's a decision you would have to

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make. The Court will allow it if you would like to poll the jury.

MR. CAIN: We will waive the polling of the jury.

THE COURT: All right, sir. Ladies and gentlemen, as I stated, this ends your deliberations. I know it has been an ordeal for you to sit through this and to perform the responsibility that rested on your shoulders. The Court is certainly grateful to you for your services as jurors. You have rendered the community a valuable service by sitting as jurors and you are dismissed for the term.

SENTENCING

THE COURT: Have the defendant to approach the bench.

The State of Georgia versus Johnny Lee Gates, indictment for murder in Muscogee Superior Court, August Term 1977, verdict guilty.

It appearing to the Court that at the August Term 1977 of Muscogee Superior Court came the District Attorney of the Chattahoochee Circuit, E. Mullins Whisnant, as prosecution for the State of Georgia, and also came the defendant in the above-stated case, Johnny Lee Gates, and his own proper person, and being

IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

JOHNNY LEE GATES,	)	HABEAS CORPUS NO 446
Petitioner	)	
VS.	)	
WALTER D. ZANT, Superintendent,	)	
Georgia Diagnostic and	)	
Classification Center,	)	
Respondent	)	

MOTION FOR COUNSEL AND PAYMENT BY STATE OF INVESTIGATIVE AND LITIGATION EXPENSES

Petitioner moves the Court for counsel appointed by the Court and paid by the State, and for payment of investigative and litigation expenses, and shows that:

1.

Petitioner is an indigent who cannot afford payment of investigative and litigation expenses necessary to diligently pursue his petition for writ of habeas corpus.

2.

Present counsel did not enter the case until after Petitioner's death sentence was affirmed by the Georgia Supreme Court and certiorari denied in the United States Supreme Court.

3.

Through present counsel, Petitioner has raised numerous substantive errors in his petition for writ of

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habeas corpus which were not previously raised by his former attorneys, including whether trial judge made clear to the jury that they could recommend a life sentence even if they found an "aggravating circumstance".

4.

In order to fully and fairly present his case to the court, Petitioner needs to subpoena witnesses and hire experts to testify concerning matters in issue, but is unable to do so because he is an indigent who has been incarcerated for more than two years.

5.

Petitioner requires funds to advance his state habeas corpus claim as follows:

a. To pay for legal counsel.

b. To pay an investigator to conduct investigations in regard to:

(1) Petitioner's habeas corpus claim that the Supreme Court of Georgia is not properly reviewing cases in which the death penalty is imposed.

(2) Petitioner's habeas corpus claim that his death sentence is being enacted pursuant to a practice by Georgia prosecuting authorities, courts, juries and Govenors to discriminate on grounds of sex and poverty in the administration of capital punishment.

(3) Petitioner's habeas corpus claim challenging the composition of the grand and traverse juries of Muscogee County. The jury statistics for the last 6-10 years must be fully compiled to properly present the challenge.

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c. To pay subpoena and mileage costs of witnesses;

d. To pay for expert witnesses needed to testify concerning Petitioner's challenges to the Georgia death penalty statute.

WHEREFORE, Petitioner prays that the Court:

(a) Appoint counsel to be paid by the State.

(b) Authorize payment by the State of investigative, witness-lay and expert-and litigation expenses reasonably necessary for Petitioner's habeas corpus case to be fully and fairly heard.

Respectfully submitted,

RONNIE K. BATCHELOR
Attorney for Petitioner

BATCHELOR & WAGES
4179 Memorial Drive
Decatur, GA 30032
404/296-1500

CERTIFICATE OF SERVICE

This is to certify that I have this day served counsel for the opposing party in the foregoing manner with a copy of this pleading by depositing in the United States Mail a copy of same in a properly addressed envelope with adequate postage thereon.

This _____ day of _____, 19____

_____

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IN THE SUPERIOR COURT FOR THE COUNTY OF BUTTS

STATE OF GEORGIA

JOHNNY LEE GATES,	) HABEAS CORPUS NO. _____
Petitioner	)
VS.	)
WALTER D. ZANT, Superintendent,	)
Georgia Diagnostic and	)
Classification Center,	)
Respondent	)

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S MOTION FOR COUNSEL AND PAYMENT BY STATE OF INVESTIGATIVE AND LITIGATION EXPENSES

In an effort to establish factually the claims alleged in his habeas corpus petition, petitioner has moved the court to authorize payment for legal counsel, an investigator, subpoena and milegage costs of witnesses and expert witnesses. Motion, at 1. A number of legal precedents support this request in the circumstances of this case.

There is a federal constitutional requirement that state post-conviction procedures be fundamentally fair and adequate for the full adjudication of federal constitutional claims. "It is the solemn duty of ... [state] courts, no less than federal ones, to safeguard personal liberties and consider federal claims in accord with federal law." Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (concurring opinion of Mr. Justice Powell).[1] See, e.g. McNeil v Culver, 365 U.S. 109, 117 (1961); Wilde v Wyoming, 362 U.S. 607 (1960); Sublett v. Adams, 362 U.S. 143 (1960).

1. See, Case v. Nebraska, 381 U.S. 336, 344-345 (1965) (Concurring opinion of Mr. Justice Brennan) (footnote omitted).

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The ability of a prisoner to establish his Federal constitutional claims in a state post-conviction proceeding will normally depend on the evidence he can muster and this, in turn, may depend on his economic status. While the State is under no obligation to equalize exactly the opportunitites of indigent and non-indigent prisoners to obtain collateral relief from criminal convictions, a number of precedents during the last twenty years establish that the Equal Protection and Due Process Clauses of the Fourteenth Amendment do not allow a State's criminal justice system to deprive indigent defendants of basic procedural rights to obtain redress from illegal or unconstitutional convictions simply because of their indigence. The State must furnish indigent defendants with "the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners." Britt v. North Carolina, 404 U.S.226, 227 (1971).

The fundamental fact that courts have recognized is that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." Griffin v. Illinois, 351 U.S. 12, 19 (1956). See, Coppedge v. United States, 369 U.S. 438, 446-447 (1962). For "differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution." Roberts v. LaVallee, 389 U.S. 40, 42 (1967). Thus, counsel must be appointed to represent indigent defendants at felony trials, Gideon v. Wainwright, 372 U.S. 335 (1963); Powell v. Alabama 287 U.S. 45 (1931), and misdemeanor trials, Argersinger v. Hamlin, 407 U.S. 25 (1972), and on appeal, Douglas v. California, 372 U.S. 353 (1963). A transcript for appeal

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may not be denied to a convicted defendant simply because of his indigence, Griffin v. Illinois, supra; Draper v. Washington, 372 U.S. 487 (1963); Williams v. City of Oklahoma City, 395 U.S. 458; Mayer v. City of Chicago, 404 U.S. 189 (1971); see also Rinaldi v. Yeager, 384 U.S. 305 (1966). An indigent defendant may not be forced to pay a filing fee as a prerequisite for an appeal, Burns v. Ohio, 360 U.S. 252 (1959); Douglas v. Green, 363 U.S. 192 (1960). A convicted defendant may not be imprisoned simply because he is unable to pay a fine, Williams v. Illinois, 360 U.S. 252 (1959; Tate v. Short, 399 U.S. 235 (1970). See also Boddie v. Connecticut, 401 U.S. 371, 375-377, 382-383 (1971). Cf. Britt v. North Carolina, supra.

The principle that the State cannot deny fundamental procedural rights in the criminal justice system simply because of economic status is not, however, limited to trials and direct appeals: "for the indigent as well as for the affluent prisoner, post-conviction proceedings must be more than formality." Johnson v. Avery, 393 U.S. 483, 386 (1969). In Johnson, the Supreme Court of the United States invalidated the State of Tennessee's prison regulation prohibiting its inmates from assisting one another in the filing of state or federal post-conviction writs. The Court held that the impact of the State's regulation was to unconstitutionally "forbi[d] illiterate or poorly educated prisoners to file habeas corpus petitions." 393 U.S. 487. Subsequently, in Bounds v. Smith, ____U.S._____, 97 S.Ct. 1491, 1498 (1977), the Court held that states were constitutionally obligated "to assist inmates in the preparation and filing of meaningful

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legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law." In reliance upon Bounds v. Smith, supra, a recent Federal district court opinion held that an indigent habeas corpus petitioner was entitled to appointed counsel and payment by the state of investigative, witness and litigation expenses to insure a full and fair hearing. Gibson v. Jackson, ____ F.Supp. ____ (M.D. Ga., December 20, 1977). Court decisions make clear that access to state post-conviction procedures may not be limited by economic barriers which have no rational relationship to the merits of the legal claims sought to be raised. See Eskridge v. Washington State Board of Prison Terms and Paroles, 357 U.S. 214 (1958); Ross v. Schneckloth, 347 U.S. 575 (1958); McCrary v. Indiana, 364 U.S. 277 (1960); Smith v. Bennett, 365 U.S. 708 (1961); Lane v. Brown, 372 U.S. 477 (1963); Long v. District Court of Iowa, 385 U.S. 192 (1966); Gardner v. California, 393 U.S. 367 (1969). Discrimination "based on indigency alone," Lane v. Brown, supra, 372 U.S. at 485, is impermissible.

In the present case, while the State of Georgia has not denied petitioner formal access to its post-conviction remedies, by denying him funds for investigators (legal resources available to more affluent defendants), it has rendered these proceedings a "meaningless ritual," Douglas v. California, supra, 372 U.S. at 358. And this has occurred in a case where the highest standard of regularity and fairness is required, for at stake is petitioner's very life, since the State has exacted the "unique and irreversible penalty of death," Woodson v. North Carolina, 428 U.S. 280, 287 (1976) (plurality opinion) (footnote omitted). In death cases, courts must be "particularly sensitive to see that every

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safeguard is observed," Gregg v. Georgia, 428 U.S. 153, 187 (1976) (plurality opinion). For it "cannot fairly be denied ... that death is a punishment different from all other sanctions in kind rather than degree .... Because of that qualitative difference, there is a corresponding difference in the need for reliability that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U.S. at 303-305 (plurality opinion) (footnote omitted.).[1]

Ross v. Moffitt, 417 U.S. 600 (1974), is not a barrier to granting the relief petitioner seeks for three reasons. First, Ross was not a capital case but rather involved the question of whether counsel should be appointed to represent a defendant convicted of check forgery on his second (discretionary) appeal within the State court system and on certiorari to the Supreme Court of the United States. See, Carey v. Garrison, C-C-75-342 (W.D. N.C. Nov. 11, 1975).

Second, Ross rests partially upon the assumption, see Ross v. Moffitt, supra, 417 U.S. at 615, that appointment of counsel for a second appeal is unnecessary because there has already been a trial, which has produced a full ventilation of issues relating to the defendant's guilt and an appeal in which a brief, prepared by a trained lawyer, has organized and researched legal errors which may infect the conviction. However, in the present case, there are issues presented by the petition which were not addressed at trial.

Finally, Ross involved the right to counsel on appeal where there had already been one appeal. Petitioner, on the other hand, faces the terra incognita of a evidentiary hearing where new factual and legal issues must be prepared

1. In Gardner v. Florida, ___ U.S. ___, 97 S.Ct. 1197, 1204 (1977), the court noted that: "Five members of the Court have now expressly recognized that death is a different kind of punishment than any other which may be imposed in this country .... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action."

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and presented. As the Supreme Court of the United States remarked in Powell v. Alabama, supra, 287 U.S. at 68-69, of an indigent defendant who faced a capital trial without adequate counsel: "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."

The decision in Gregg v. Georgia, 428 U.S. 153 (1976), that the Georgia capital punishment statute is constitutional on its face, does not foreclose the possibility of petitioner's prevailing on his habeas petition, because it is a truism that a constitutional statute may be unconstitutionally applied, see, e.g., Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886), and one of petitioner's contentions is that as applied the death penalty is in fact orbitrary, capricious, and discriminatory.

Petitioner's constitional contentions present a classic instance in which the "salutary principle that the essential facts should be determined before passing upon grave constitutional questions is applicable." Polk v. Grove, 305 U.S. 5, 10 (1938).[1] That principle applies "if there is a reasonable likelihood that the production of evidence will make the answer to the [constitutional] questions clearer." Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, 213 (1934) (concurring opinion of Justice Stone and Justice Cardozo). Expert testimony and empirical data have played a significant part in the development of constitutional law, see, e.g., Brown v. Board of Education, 347 U.S. 483, 484 n. ** (1954); Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 460-61 (1945); San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 23-25 (1973), and would illuminate

1. "Judges make constitutional law as they make other kinds of law, on the basis of facts proved and assumed. They are likely to do a better job when their assumptions rest on information rather than hunch." Karst, Legislative Facts in Constitutional Litigation, in KURLAND (ed.) THE SUPREME COURT REVIEW, 1960 at 75. See also, Bikel, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 HARV. L. REV. 6 (1942).

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the constitutional claims petitioner is raising in this case. Adjudication of "important constitutional question[s] on the pleadings is not favored," Wilshire Oil Co. v. United States, 295 U.S. 100, 102 (1935), the appropriate procedure being "determination by the ... [trial] court of the facts of the case to which the challenged statute is sought to be applied," id. at 102-103. See also, Morton Salt Co. v. City of South Hutchinson, 159 F.2d 897, 902 (CA10 1947); Cone v. Rorick, 112 F.2d 894, 897 (CA4 1940).

The precise relief to be granted pursuant to petitioner's Motion rests within the discretion of the Court. The parties might be instructed to submit plans for the study of a representative sample of Georgia capital cases arising under the 1973 capital punishment statute. The Court might order the parties to submit the names of social scientists who would submit plans for such a study. Or the Court might appoint a special auditor to make findings of fact, since Georgia law provides for the appointment of auditors "in equitable proceedings if the case shall require it," Ga Code Ann §10-101. The auditor is authorized to pass upon "questions of ... fact" arising from the contentions of the parties, and he is empowered to "subpoena and swear witnesses and compel the production of papers." Ga Code Ann §10-103. He may also hold evidentiary hearings, Ga Code Ann §10-104, and prepare reports, Ga Code Ann §10-201, containing findings of fact, Ga Code Ann §10-203.

While petitioner's motion necessitates the expenditure of State funds, the rights of an indigent defendant are not subject to a balancing test when his life is at stake. In Mayer v. City of Chicago, 404 U.S. 189 (1971), for example,

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the City argued that it should not have to provide transcripts for an appeal of right to indigent prisoners sentenced to pay a fine. The Court flatly rejected this contention:

> The city suggest that ... [an indigent defendant's] interest in a transcript is outweighed by the State's fiscal and other interests in not burdening the appellate process. This argument misconceived the principle of Griffin ... Griffin does not represent a balance between the needs of the accused and the interests of society, its principle is a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way. The invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed. The State's fiscal interest is, therefore, irrelevant.

404 U.S. at 196-97. The Georgia State Bar Association has recognized that "[a] lawyer is often no better than the investigation facilities of expert witnesses at his command.[1] Since "[t]he magnitude of a decision to take a human life is probably unparalleled in the human experience of a member of a civilized society," Marion V. Beto, 434 F.2e 29, 32 (5th Cir. 1970), it should be adequate to insure that this indigent, death-sentenced inmate has a realistic opportunity to present in his state habeas corpus proceeding the Federal constitutional contentions which may save his life.

Respectfully submitted,

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1. Committee of the State Bar of Georgia on Compensated Counsel, Assistance to the Indigent Person Charged with Crime, 2 GA.B.J. 197, 202 (1965).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the copies of the within and foregoing on the respondent in this action by placing true and correct copies thereof in the United States Mail, first class postage prepaid, addressed to respondent as follows:

Mr. Walter D. Zant
Superintendent
Georgia Diagnostic & Classification Center
P. O. Box 3877
Jackson, Georgia 30233

and on the Attorney General by placing a true and correct copy thereof in the United States Mail, first class postage prepaid, addressed as follows:

Hon. Arthur K. Bolton
Room 132
Judicial Building
Capitol Square
Atlanta, Georgia 30334

This _____ day of August, 1980.

RONNIE K. BATCHELOR
Attorney for Petitioner

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